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Issue Date: 25 September 2003

CASE NO. 2003-AIR-0030

In the Matter of:

LORETTA JEAN FULLINGTON,
Complainant,

vs.

SOUTHWEST AIRLINES CO.,
Respondent.

ORDER

PROCEDURAL BACKGROUND

This proceeding arises under the employee protection provisions of the Wendell H. Ford Aviation and Investment Reform Act for the 21st Century ("AIR21" or "the Act"), 49 U.S.C. §§ 42121 et seq.

On August 30, 2002, Loretta Fullington ("Claimant") filed an action with Region VI of the United States Department of Labor's Occupational Safety and Health Administration ("OSHA") alleging a violation of the Act by AVSEC Services, L.L.C. ("AVSEC"). On October 25, 2002, Ms. Fullington amended her complaint after she retained an attorney. This amended complaint named Southwest Airlines ("Southwest"); National Airlines; and American Airlines as additional Respondents. The OSHA Administrator later requested that Ms. Fullington add OCS Group of Companies as a respondent because OCS is a potential parent company to AVSEC.

On April 25, 2003, the Secretary of Labor issued findings dismissing Ms. Fullington's complaint. However, the Secretary's correspondence was captioned "AVSEC Services, L.L.C./Fullington/1085067" and did not mention Southwest or any of the other respondents named in the October 25, 2002 amended complaint. On May 6, 2003, Ms. Fullington filed a request for an administrative appeal objecting to the Secretary's April 25, 2003 findings. This notice of appeal was sent to Southwest. On May 22, 2003, Notice of Trial with the caption "Loretta Fullington v. AVSEC Services, L.L.C." was issued, and a copy of this Notice was served on Southwest. On May 23, 2002, the Secretary issued additional findings dismissing the complaint for failure to state a *prima facie* complaint against Southwest. This correspondence

was captioned "Southwest Airlines/Fullington/1085067."[1] On July 31, 2003, a notice consolidating Ms. Fullington's complaints against AVSEC and Southwest was issued in the captioned matter. On August 14, 2003 Southwest filed a Motion to Dismiss. On September 2, 2003, Ms. Fullington filed an Opposition, and on September 15, 2003, Southwest filed a response.

DISCUSSION

Respondent argues that it must be dismissed from this proceeding because Ms. Fullington did not file a timely objection to the Secretary's findings or because Ms. Fullington has failed to state a *prima facie* case against Respondent.

A. Timeliness of the Appeal

Southwest argues that Ms. Fullington has never filed objections to the Secretary's findings dated May 23, 2002, which dismissed her complaint against Southwest for failure to state a *prima facie* case. Ms. Fullington counters that she never received the May 23, 2003 findings that addressed her failure to state a claim against Southwest Airlines. Further, Ms. Fullington argues that her claim against Southwest was constructively denied when OSHA denied her claim against AVSEC. Fullington Opp. at p. 3:25-4:3. Southwest Airlines responds that the Department of Labor informed Ms. Fullington on May 5, 2003, that AVSEC was the only respondent over whom it had assumed jurisdiction. Resp. Reply at Ex. 1.[2]

Ms. Fullington's notice of appeal from May 6, 2003 substantially complied with the requirements for filing a timely appeal under the Act. The "substantial equivalent" of a notice of appeal has been met when the notice of appeal specifies the party taking the appeal, the order appealed from, and the tribunal to which the appeal is being taken. Daugherty v. General Physics Corp., 92-SDW-2 (ALJ Dec. 14, 1992); Greater Houston Chapter of American Civil Liberties Union v. Eckels, 763 F.2d 180 (5th Cir. 1985)(citing Van Wyk El Paso Investment, Inc. v. Dollar Rent-A-Car Systems, Inc., 719 F2d 806 (5th Cir. 1983). In this case, the evidence received establishes that Ms. Fullington named Southwest Airlines as a respondent as early as October 25, 2002. Ms. Fullington timely filed an appeal to OSHA's April 25 findings on May 6, 2003. Notice of this appeal was also sent to Southwest Airlines. Although the appealed filing only included AVSEC's name as a respondent, the filing denied a complaint that included Southwest as a respondent. Further, the May 5 letter from OSHA to Ms. Fullington indicated that the April 25 filing was the only determination that OSHA had made or would make in this case. Southwest Airlines has not demonstrated that it suffered undue prejudice as a result of Ms. Fullington's notice of appeal.

[1] This correspondence indicates that it was posted by "Overnight Mail." As such, the Secretary failed to comply with 29 C.F.R. § 24.4(d)(1), which requires that such determinations be sent via certified mail.

[2] Again, this correspondence was sent by "overnight mail." Further, the copy received here, which was an exhibit to Southwest's Response, had half of the document's text blocked out.

B. Failure to State a *Prima Facie* Case

Southwest knew of its potential liability in this case as early as October 25, 2002, and it was also informed of Ms. Fullington's appeal on May 6, 2003. The dispositive issue here is whether Ms. Fullington has failed to articulate a *prima facie* case against Southwest. In order to articulate a *prima facie* case under AIR21, Ms. Fullington must allege the existence of facts and evidence to demonstrate the following: (1) the employee engaged in protected activity or conduct; (2) the named person [Southwest Airlines] knew or suspected, actually or constructively, that the employee engaged in the protected activity; (3) the employee suffered an unfavorable personnel action; and (4) the circumstances were sufficient to raise the inference that the protected activity was a contributing factor in the unfavorable action. 29 C.F.R. § 1979.104(b)(1)(i)-(iv).

Southwest argues that it was not Ms. Fullington's employer and could not have subjected her to an unfavorable personnel action. Southwest's Motn. to Dismiss, Aug. 15, 2003, at p. 5. In addition, Southwest argues that Ms. Fullington has not demonstrated that Southwest was aware of her protected activity or that it was involved in her termination from AVSEC. Id. Ms. Fullington responds that an employment relation existed because Southwest exercised supervision and control over Ms. Fullington's employment. Fullington Opp., Sept. 5, 2003, at p. 9 and Ex. A. Further, Ms. Fullington responds that Southwest Airlines knew of Ms. Fullington's protected activity. Id.

As defined by 29 C.F.R. § 1979.101, Ms. Fullington could qualify as Southwest's employee in that her "employment could be affected by an air carrier" such as Southwest. Further, whistleblower statutes have been construed to "encompass an employee who is not a common law employee of the respondent employer." Dempsey v. Fluor Daniel, Inc., 2001-CAA-5 (ALJ June 27, 2001) (quoting Stephenson v. National Aeronautics & Space Administration, A.R.B. No. 98-025 at 13 (July 18, 2000). In Stephenson, the Board determined that a contractor who "hires, fires, or disciplines" an employee may be subject to a whistleblower action. Id. In addition, a contractor who limits or cancels a contract with a subcontractor and displaces its employees may also be subject to a whistleblower action. Id. Ms. Fullington asserts that the airlines who contracted with AVSEC supervised AVSEC employees as they performed their duties and even evaluated the individual working areas of AVSEC employees. Fullington's Opp. to Motn. to Dismiss, Ex. A at pp. 1-2. In light of this information, Ms. Fullington could qualify as Southwest's employee. Moreover, the regulations governing a *prima facie* case speak in terms of "named person" as opposed to "employer." 29 C.F.R. § 1979.104(b)(1)(ii). "Named person" is defined as "the person alleged to have violated the Act." C.F.R. § 1979.101. Thus, it appears the Act contemplates that an entity other than a claimant's common law employer could initiate an unfavorable personnel action and violate the Act.

Ms. Fullington has also alleged facts which demonstrate that she engaged in protected activity. She alleges that after she learned that AVSEC was allegedly performing security checks that it was not allowed to perform, she complained to her supervisors at AVSEC and a representative of Southwest. Ms. Fullington further alleges that, she complained to the Federal Aviation Administration ("FAA") and the Department of Transportation (DOT) when AVSEC

continued to perform these activities. After she complained to these federal agencies, Ms. Fullington alleges that AVSEC threatened her job and ultimately dismissed her. Id.

However, Ms. Fullington has not alleged facts that demonstrate that Southwest knew of her protected activities. Ms. Fullington's complaint dated October 25, 2002 states that Southwest completed a "cleanliness report card" on a daily basis that evaluated the work of individual AVSEC employees. Fullington Opp., Ex. A at 1-2. However, these reports seem to allow Southwest to notify AVSEC whether its employees were properly cleaning the airplanes. Although AVSEC may have used these reports in deciding whether to re-assign, reprimand, or terminate its employees, the ultimate power to make such decisions apparently rested with AVSEC. Indeed, Ms. Fullington alleges that AVSEC threatened her job after she complained to the federal agencies. Ms. Fullington does not allege or mention that any representative from Southwest threatened her job or even acknowledged that she had spoken to the federal agencies. The only suggestion that Southwest knew of Ms. Fullington's protected activities is her allegation that Seth Wells, an AVSEC employee, reprimanded her after a three hour meeting with the FAA on August 22, 2002. Id. at p. 3. Ms. Fullington alleges that Mr. Wells told her that a representative from Southwest was present at this meeting. Id. Additionally, Ms. Fullington alleges that the DOT met with AVSEC on August 27, 2002 to follow up on the FAA complaint, but she does not allege that Southwest attended this meeting. Id. Ms. Fullington does allege that she was informed of her termination on August 29, 2002, even though her last paycheck was dated August 27, 2002 – the date on which the DOT met with AVSEC. Id. Ms. Fullington's allegations do not give rise to the inference that Southwest knew of her protected activity or initiated her termination from AVSEC on account of her protected activity.

CONCLUSION

The evidence submitted shows that Ms. Fullington substantially complied with the Act's requirements for proceeding with an appeal. As such, her claim against Southwest Airlines is not barred by the statute of limitations. However, Ms. Fullington has failed to allege facts sufficient to articulate a *prima facie* case against Southwest Airlines. As such, Southwest Airlines motion to dismiss should be granted.

ORDER

Respondent Southwest Airlines' Motion to Dismiss is hereby GRANTED.

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ALEXANDER KARST
Administrative Law Judge